Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

DEBORAH J. THOMAS,
Petitioner,

v.

THE WALT DISNEY COMPANY, WALT DISNEY STUDIOS, DISNEY PRESS, PIXAR ANIMATION STUDIOS, WALT DISNEY FEATURE ANIMATION, WALT DISNEY PICTURES, DISNEY ENTERPRISES, INC., AND DOES 1 THROUGH 100, INCLUSIVE,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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December 28, 2009

QUESTIONS PRESENTED

I. In a copyright infringement action concerning Writer Thomas' exclusive right "to authorize use of her copyrighted work in the preparation of derivative works" (e.g., subsequent screenplays, motion pictures, books) 17 U.S.C. §106 (2) in which copying without authorization is either assumed or conceded (i.e. direct evidence of copyright infringement), is the Judge's application of the lawyer-created indirect evidence 'substantial similarity' test rather than the Congressionally mandated Copyright Act's 'lack of authorization' test an unconstitutional violation of the Separation of Powers doctrine?

II. Did the Ninth Circuit's application of the unprecedented 'hybrid substantial similarity' test for copyright infringement in a Pre-Answer Rule 12(b)(6) Motion to Dismiss in which the Judge took on the fact-determination role of the jury violate Writer Thomas' 7th Amendment Right to a jury trial in a copyright infringement action?

1. If not, did the Ninth Circuit's application of the lawyer-created 'hybrid substantial similarity' test on a *sample* of unverified/unauthenticated works and dismissal of all of Writer Thomas' separate and distinct causes of actions concerning separate and distinct unauthorized derivative works not even in the record violate Writer Thomas' due process, equal opportunity and access to the courts?

2. If not, did the Ninth Circuit err in taking judicial notice of and relying upon documents outside the pleadings, including the testimony and declaration of Disney Defendants' *Attorney*?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Ninth Circuit.

The Petitioner here and the appellant below is Deborah J. Thomas.

The appellees below and the respondents here are: The Walt Disney Company, Walt Disney Studios, Disney Press, Pixar Animation, Walt Disney Feature Animation, Walt Disney Pictures and Disney Enterprises, Inc. ("Disney Defendants").

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II. The Ninth Circuit deprived Writer Thomas due process, equal opportunity and equal access to the courts by granting a Pre-Answer, Pre-discovery Rule 12(b)(6) Motion to Dismiss and making a factual determination based solely on a *sample* of unverified works outside of the Complaint, the only pleading before the court, and dismissing *all* of Writer Thomas' separate causes of action..... 24

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The opinion of the Court of Appeals denying Petitioner's petition for rehearing en banc is reprinted in the Appendix to the Petition ("Pet. App.") at Pet. App. 1a-2a. The opinion of the Court of Appeals is unpublished, and is reprinted in the Pet. App. 3a-3a. The District Court's opinion is reported at *Thomas v. Walt Disney Co.*, No. C-07-4392, 2008 U.S. Dist. LEXIS 14643, at *5 (N.D. Cal. Feb. 14, 2008) and is reprinted at Pet. App. 4a-5a.

JURISDICTION

The Court of Appeals entered its judgment on February 14, 2008 and its order denying the petition for panel rehearing on September 28, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following provisions of the United States Constitution:

United States Constitution Article I, §1:
"All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

United States Constitution Article I, § 8, cl. 8:
"[All legislative powers herein granted shall be vested in a Congress...] To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

United States Constitution Article V:
"[] nor shall any person be...deprived of life, liberty, or property, without due process of law..."

U.S. Constitution, 7th Amendment :
"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

This case involves provisions of the U.S. Copyright Act, 17 U.S.C. § 101, *et seq.* The pertinent provisions are reproduced in the Appendix at Pet. App. MA-59.

STATEMENT OF THE CASE

This unprecedented Ninth Circuit ruling, affirming a never before applied defense-attorney created indirect evidence 'hybrid substantial similarity' test for copyright infringement presents further conflict and contradictory analysis for copyright infringement actions not only amongst the Circuits but also *within* the Circuits.

The Ninth Circuit affirmed the district court's order granting the Disney Defendants' Pre-Answer, Pre-Trial, and Pre-Discovery Federal Rule of Civil Procedure Rule 12(b)(6) Motion to Dismiss Writer Thomas' Copyright and Idea Complaint without affording Writer Thomas the due process and opportunity to be heard through a jury trial and the opportunity to conduct discovery of the *preparation* (i.e., development) of the unauthorized infringing

derivative works (e.g., subsequent motion picture(s), book(s), tov(s), merchandise and live performances. Pet. App. EA-31 FAC ¶ 38)). The Ninth Circuit sanctioned the conduct of the district court that seeks to thwart Congress's intent to protect creative original authors and encourage creative works through the exercise of Congress' constitutionally mandated exclusive authority to grant to authors/copyright owners certain exclusive rights to and in their works. See U.S. Const. art. I, § 1; U.S. Const. art. 8, § 8 ; 17 U.S.C. § 106 et. seq.

At stake in this case are the fundamental provisions of the U.S. Constitution: (a) the separation of powers provision in which exclusive authority "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" is allocated to Congress which exercised such legislative power through the enactment of the Copyright Act, U.S. Const. art. I; U.S. Const. art. 8, § 8, and (b) the constitutionality of the Ninth Circuit's sanctioning of the district court's rulings in this copyright infringement action which usurped such Congressional exclusive authority;(c) due process and equal opportunity and access to the courts; and (d) Writer Thomas' 7th Amendment right to a jury trial in copyright infringement actions. *See* U.S. Const. art. I, U.S. Const. art.8, § 8, U.S. Const. Amend. VII.

Further, at stake in this case are the fundamental provisions of the Copyright Act: the interpretation and application of statutory language that explicitly defines (a) the exclusive rights of the copyright owner; (b) the rights and circumstances

upon which a motion picture derivative work obtains its own copyright; and, (c) infringement of exclusive rights and the copyright owner's redress for infringement, and those provisions that unambiguously spell out that which constitutes an infringing use of the underlying copyrighted pre-existing work (i.e., Writer Thomas' short stories) from which a motion picture derives.

Should Disney Defendants prevail with the Ninth Circuit's sanctioning of the district court's wholesale pre-Answer, pre-discovery, pre-trial dismissal of Writer Thomas entire Copyright Infringement and State Law Idea Claims Complaint, without affording Writer Thomas a jury trial on the key issue of whether or not the Motion Picture derivative is an infringement of Writer Thomas' right to authorize the use of her copyrighted short stories in the preparation (i.e., development) of subsequent derivative works, then the Copyright Act and Congressional exclusive authority over issues of copyright are rendered worthless and the Ninth Circuit would have effectively, and unconstitutionally, legislated judicially.

Such egregious conduct of the Ninth Circuit resulted in decisions concerning "an important federal question in a way that conflicts with relevant decisions of this Court" and "has sanctioned the district court's conduct that so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power." *See, e.g., City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) ("Federal common law is a necessary expedient, and when Congress addresses a question previously governed by a decision rested on

federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.") (internal quotation marks and citations omitted); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) ("While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations...Factual allegations must be enough to raise a right to relief above the speculative level, []on the assumption that all the allegations in the complaint are true (even if doubtful in fact)").

Immediate consideration and review of the Ninth Circuit's unprecedented application of a new defense lawyer-made 'hybrid substantial similarity' test in copyright infringement cases by this Court that would result in a final, concrete answer and guide for all copyright owners.

This case presents this Court with issues that have not been resolved by the Circuits but that should be resolved by this Court concerning: (a) the separate exclusive right concerning a copyright owner's exclusive right to use or authorize the use of their copyrighted work in the *preparation* of derivative works (e.g., the Copyright Act specifically identifies a 'motion picture' as a derivative work, 17 U.S.C. § 103, and (b) the unconstitutionality of applying a defense lawyer-made 'substantial similarity test' where, as here, direct evidence of copying without authorization is governed by the literal words and intent of the Copyright Act.

A. Factual Background

Writer Deborah Thomas, a published poet and photographer, had worked for several years as a Scuba Divemaster and a Tropical Fish Collector in the Florida Keys. In the summer of 2000, inspired by her five year old daughter, Deborah wrote a short story about a Rock Beauty, a type of Angelfish, and his adventures after being captured by a human. At the time Deborah wrote this story in 2000, this idea was unique as it was based on her own experiences of chasing and catching these fish in which Deborah observed them in their own habitat and participated in their interactions with humans.

On or about April 6, 2001 and believing that the Disney Company would be interested in her unique idea gleaned from her personal experiences, Deborah submitted her unique story idea and copyrighted short story "Squisher the Fish" to Disney Defendants in an envelope labeled "Submission." Deborah also included a cover letter indicating her desire to be paid for the sale of her idea and copyrighted work should Disney be interested in her submission after Disney's consideration of her work. Pet. App. G 45a(Writer Thomas' correspondence to Disney).

It is undisputed that Disney opened Deborah's' submission, and after reviewing the submission for over three months, contacted Deborah on June 22, 2001 and returned her submission- pursuant to the Disney policy, purportedly the same policy outlined in a Disney/ABC memo which outlined the procedures for Disney/ABC employees to use upon receipt of submissions so that Disney could

steal ideas and copyrighted work without compensating the original copyright owners. Pet. App JA-56(memo from Disney/ABC legal department); Pet. App. G47a(Disney's correspondence to Writer Thomas regarding her idea and story submission "Squisher the Fish"). On or about April 27, 2004, Deborah applied to the Register of Copyrights for and obtained a Certificate of Registration TXu1-175-008 for her *unpublished* short story "Squisher the Fish." Pet. App. E EA-31AC, Ex. A).

The undisputed facts set forth in the Complaint - and assumed as true on a Rule 12(b)(6) Motion to Dismiss - are that during the three months of Disney's acknowledge possession of Deborah's copyrighted short story "Squisher the Fish", that Disney Defendants copied and adapted Writer Thomas' short story without her authorization and knowledge. As alleged in the Complaint - and assumed to be true and undisputed - the Disney Defendants then during the course of the standard two years of development of a motion picture derivative and without Deborah's knowledge and consent used Deborah's unique idea and copied and used Deborah's copyrighted "Squisher the Fish" as the underlying work upon which the unauthorized subsequent derivative screenplays and motion picture derivatives, eventually entitled "Finding Nemo" were based.

In 2003, Disney Defendants released the motion picture derivative "Finding Nemo" -- about the adventures of a Fish after being captured by humans. "Finding Nemo" has grossed over $325 million dollars (domestically) and is currently the top

15th highest all-time grossing domestic motion picture even six years after initial release. Pet. App. K.

B. Proceedings Below

Writer Thomas filed a complaint for relief under California Business and Profession Code § 17200, et. seq. on May 29, 2007. Pet. App. F36a. The case was removed to The Northern District of California on August 24, 2007. Writer Thomas filed a First Amended Complaint on October 31, 2007. Pet. App. EA-31

Disney Defendants did not file any Answers to the First Amended Complaint, and instead filed a Rule 12 b 6 Motion to Dismiss the First Amended Complaint for Failure to State a Claim along with a Motion for Judicial Notice of various documents that Disney Defendants Defense *Attorney* downloaded from the world-wide web. Pet. App. L94a (docket); Pet. App. H48a (Disney Defendants' *Attorney's* declaration). Also, attached to Defendants' *Attorney's* declaration was the original version of Writer Thomas copyrighted work (although admittedly not the subsequent revised work Disney concedes possessing for over three months), *see* Pet. App. BA-6 FN2(court order), along with a DVD of purportedly one of the unauthorized motion picture derivatives of "Finding Nemo." Not one Defendant submitted any declaration in support of the Motion and did not even verify that it was asserting copyright ownership the their *Attorney's* DVD submission. The District Court granted the Disney Defendants' Motion for Judicial Notice while denying Writer Thomas' request to submit the actual version

of her copyrighted work that Disney Defendants had in possession. Pet. App. D6a.

The District Court held oral argument and improperly relied solely upon the testimony of *Attorneys* for an expert/opinion analysis of substantial similarity. Pet. App IA-47 (Transcript of Hearing). The District Court issued an Order on February 14, 2008 after taking on the role of the jury and making a fact determination through a 'substantial similarity' analysis of only a *sample* of unverified/unauthenticated works and dismissing Writer Thomas' Complaint in its entirety. Pet. App. BA-6 Judgment was entered the same day. Pet. App. CA-27

On July 8, 2009, the Ninth Circuit affirmed the dismissal in an unpublished order that consisted solely of five (5) sentences (excluding case law and quotes from case law) and with no de novo discussion. Pet. App. AA-3a. The Ninth Circuit denied Writer Thomas' Motion for rehearing en banc on September 28, 2009. Pet. App DA-29

REASONS FOR GRANTING THE PETITION

I. The Importance of the Question

This case presents exceedingly important and unprecedented questions of federal law that have not been but should be settled by this Court, and concerning issues that the circuits are in conflict: concerning the constitutionality of the application of defense attorney-created and judicially sanctioned 'substantial similarity' test for infringement of a copyright owner's separate and distinct exclusive

right to 'use and authorize the use of her copyrighted work in the *preparation* of derivative works' , 17 U.S.C. § 106(2), which is in direct conflict with the language and intent of the Copyright Act's unambiguous stated requirement for infringement that requires only a showing that the accused infringer used ' any *portion* of the underlying copyrighted work *without authorization*.' The House Report provides: "[T]o constitute a violation of section 106(2), the infringing work must incorporate a portion of the copyrighted work in some form." H.R. REP. No. 1476,note 149, at 5675.

The core question concerning the lack of uniformity and consistency of the varying and contradictory applications of a test for copyright infringement in which some Federal Circuits are usurping the power of Congress, ignoring the literal plain language of the U.S. Copyright Act, and applying movie-studio defense *attorney*-created 'substantial similarity' tests rather than the U.S. Copyright Act's 'use and lack of authorization' test. 17 U.S.C. §§ 103, 106.

Review is urgently needed not only to resolve the conflicts amongst the circuits, but more importantly to clarify and confirm the standards for the applicability of the Copyright Act's 'lack of authorization' test for an accused copyright infringer's 'unauthorized use of any portion of the copyrighted underlying work" in subsequent infringing derivative works (e.g., motion picture adaptations).

The importance and urgency of an immediate consideration by this U.S. Supreme Court goes

beyond just the ramifications that this ruling and this Court's resolution of these issues would have in the United States. Review and confirmation that the Copyright Act protections are afforded equally to individual writers as they are to corporate billion dollar media companies who exercise their rights as plaintiffs and are afforded due process, will allow the U.S. Federal Judiciary to gain the respect of the worldwide public in light of the corporate criminal white collar crimes - e.g., Google, Inc.'s recent conviction of willful copyright infringement in *France* for the exact conduct the U.S. Courts (S.D.N.Y.) fail to prosecute, Madoff, Dreier scandals - that have contributed to the financial crisis of the United States but also to the loss of all faith in the integrity of the Federal Judiciary.

The Questions presented in this Petition are "questions whose resolution will have immediate importance far beyond the particular facts and the parties involved."

A. This case raises the critically important question of the unconstitutionality of the application of the movie studio defense-attorney created indirect evidence 'substantial similarity' test to determine infringement of the copyright owner's separate and distinct exclusive right "to authorize use of copyrighted work in the *preparation* (development) of derivative works (e.g., motion pictures, books, toys)."

Article 8, cl.8 of the United States Constitution clearly sets forth the separation of powers (executive, judicial, and legislative) and the

exclusive authority granted to Congress with regard to Copyright law: "[All legislative powers herein granted shall be vested in a Congress...] To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

The Copyright Act provides protection for original works of authorship expressed in various media. 17 U.S.C. § 101 et. seq.. The owner of a copyright has the exclusive rights (1) to reproduce the copyrighted work, (2) to prepare derivative works; (3) to distribute copies; (4) to perform publicly a copyrighted work; and, (5) to display publicly a copyrighted work. 17 U.S.C. §106.

The statutory rights of a copyright owner include the exclusive right "to prepare derivative works based upon the copyrighted work." 17 U.S.C. § 106(2). The Copyright Act defines a derivative as those works "**based upon**" an underlying copyrighted work:

> "[a derivative work] is a work based upon one or more pre-existing works,such as a translation, musical arrangement, **dramatization**, fictionalization, **motion picture version**, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or **adapted**. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole,

> represent an original work of authorship, is a "derivative work."(emphasis added). 17 U.S.C. § 106(2).

In her First Amended Complaint, Writer Thomas adequately and clearly set forth a separate cause of action for Disney Defendants' violation of Writer Thomas' exclusive right to use or authorize the use or **adaptation** of her short story "Squisher the Fish" as the underlying works upon which the subsequent unauthorized Disney Defendants' infringing **motion picture** derivative, eventually entitled, "Finding Nemo" were based:

> "38. Through their [Disney Defendants] conduct alleged herein, [Disney] Defendants have infringed Plaintiff's copyright by reproducing, ***adapting***, distributing **and/or** displaying the **movie "Finding Nemo"** and/or making and/or selling **video games, books, and other merchandise based on the movie "Finding Nemo" which embodies Plaintiff's copyrighted material ["Squisher the Fish"]** ***without authorization in violation of Sections 106 and 501 of the Copyright Act, 17 U.S. C. § § 106 and 501."*** (emphasis added).

Pet. App. EA-39 FAC, ¶38.).

A Copyright Owner may bring a claim against a person who infringes any of the plaintiff's exclusive rights in a copyright under § 106 by demonstrating two elements: "(1) ownership of a valid copyright;

and (2) copying of constituent elements of the work that are original." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). There is no substantial similarity requirement that a copyright owner needs to prove in *every copyright infringement action*.

To the Contrary, the House Report on the derivative right provision stated: "[T]o constitute a violation of section 106(2) [a copyright owner's exclusive right to authorize use of her work in the preparation of derivative works, e.g., motion pictures], the infringing [derivative] work must **incorporate a portion of the copyrighted work in some form.**" H.R. Rep. No. 1476,note 149, at 5675.

"**A portion of the copyrighted work in some form**" in fact clearly contradicts a "substantial similarity" requirement, especially in light of the singular "a" rather than "many" portion[s].

This Ninth Circuit ruling that displaced the Congressional 'lack of authorization' test with a lawyer-created 'substantial similarity' test concerning the violation of the 'derivative right' is in direct conflict with the Sixth Circuit where the Sixth Circuit gave deference to Congress' exclusive authority and held that when a defendant has not disputed copying with reference to the copyright owner's 'derivative right' cause of action, "[n]o substantial similarity or de minimus inquiry should be undertaken at all..." *Bridgeport Music, Inc. v. Dimension Films*, 410 F. 3d 792 (6th Cir. 2005). The Sixth Circuit went further to confirm Congress' statutory (Copyright Act) authority that supersedes

any defense attorney-made substantial similarity test in derivative right copyright infringement actions:

> "**Our analysis begins and largely ends with the applicable statute [Copyright Act].** Why is there no *de minimus* taking or why should substantial similarity not enter the equation. Our first answer to this question is what we have earlier indicated. **We think this result is dictated by the applicable statute [Copyright Act].**" (emphasis added).

Bridgeport Music, Inc. v. Dimension Films, 410 F. 3d 792 (6th Cir. 2005). The Sixth Circuit even expressly directed the defendant corporate entertainment companies that the only place for them to go to change this application of the law protecting the 'derivative right'...is Congress:

"**it is easy enough for the record industry, as they have done in the past, to go back to Congress for a clarification or change in the law...**" *Id.*

II. The Ninth Circuit deprived Writer Thomas due process, equal opportunity and equal access to the courts by granting a Pre-Answer, Pre-discovery Rule 12(b)(6) Motion to Dismiss and making a factual determination based solely on a *sample* of unverified works outside of the Complaint, the only pleading before the court, and dismissing *all* of Writer Thomas' separate causes of action.

The district court not only looked outside the pleadings, failed to apply the admissions of Disney Defendants (through attorneys) but also even refused to accept for consideration Writer Thomas' version of her copyrighted work that Disney Defendants conceded access. Pet. App. G41a.(Writer Thomas Decl. in Oppos).

The Ninth Circuit's Rule 12 (b)(6) Motion to Dismiss for Failure to State a Claim in a copyright infringement lawsuit dismissal based on a factual analysis pursuant to an unprecedented 'hybrid substantial similarity' comparison (skipping access and copying concessions, and failing to consider the *unpublished* nature of Writer Thomas' short story) of unverified/unauthenticated works outside the pleadings, violates long-standing procedures for dismissal motions and contradicts at least the 4th Circuit which holds that Rule 12(b)(6) Motions test the "legal sufficiency of the complaint and not the facts in support of it." *E. Shore Mkts, Inc. v. J.D. Assocs, Ltd. P'Ship*, 213 F. 3rd 175, 180 (4th Cir. 2000).

The Ninth Circuit's application of this unprecedented 'hybrid substantial similarity' test on Rule 12(b)(6) Motion also clearly conflicts with the holdings of this Court that ruled in order to survive a motion to dismiss, the complaint need only provide "a fair notice of what the claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

As shown above, in the very least, Writer Thomas indisputably satisfied the requirements of Federal Rule of Civil Procedure 8 (clearly and plainly

stated claim") and this Court's holding in *Twombly*, supra.

As substantiated above, Writer Thomas, in the very least, clearly stated a claim for the violation of her exclusive 'derivative right.' Because a violation of any one of the exclusive rights is copyright infringement, e.g, one who violates the copyright owner's right to create derivative works is an infringer. 17 U.S.C.S. §501(a). The Ninth Circuit's wholesale pre-answer dismissal of *all* of Writer Thomas' claims based on a *sample* of unverified documents is an unconstitutional deprivation of Writer Thomas's due process right to obtain the privileges granted to her and the redress afforded to her pursuant to the Copyright Act. 17 U.S.C. § 501.

The Ninth Circuit's refusal to submit any opinion with its conclusory five (5) sentence unpublished order affirming the district court's dismissal, Pet. App AA-3 Writer Thomas was deprived repeatedly of due process with this failure of the Ninth Circuit to conduct a *de novo* appellate review.

III. There is a Seventh Amendment Right to a Jury Trial in copyright infringement actions. Writer Thomas' Seventh Amendment Right to a Jury Trial was violated when the district judge took on the fact determination role on a pre-answer, pre-trial Motion to Dismiss for Failure to State a Claim.

The Seventh Amendment "requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume

directly or indirectly to take from the jury or to itself such prerogative." U.S. Const. Seventh Amendment.

The Ninth Circuit's unprecedented refusal to allow Writer Thomas to a jury trial on her copyright infringement claims contradicts and conflicts with various other Circuits and the rulings of this Court which conclude that the Seventh Amendment provides a right to a jury trial when the copyright owner endeavors to prove and recover its actual damages as well as statutory damages. *See, e.g., Video Views, Inc. v.Studio 21 Ltd.*,925 F.2d 1010, 1015 (7th Cir. 1991)(right to jury trial exists in copyright infringement action for actual damages); *cass Country Music Co., v. C.H.L.R., Inc.*, No 95-2304 (8th Cir. 1996)(either party in a copyright infringement lawsuit is entitled to a jury trial on demand); *Gnossos Music v. Mitken, Inc.*, 653 F. 2d 117, 119 (4th Cir. 1981)(copyright infringement action analogous to a common law action for tortuous interference with a property right and parties entitled to a jury trial as a result); *Markman v. Westview Instruments, Inc.*, 116 S.Ct. 1384, 1389(1996)(holding patent, and copyright, cases "derive from actions tried at law in the 18th century, and there is no dispute that infringement cases today must be tried to a jury.").

III. Immediate Review is Urgently Needed

There is no doubt that there is a lack of uniformity in the federal circuits concerning allowing an individual copyright plaintiff the right to a jury trial on copyright causes of action and there is no doubt that Writer Thomas was prevented from exercising her basic simple due process rights to

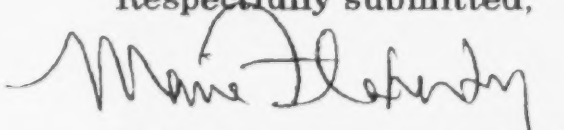
litigate her claims.

This Ninth Circuit case has effectively set precedent that strips individual writer plaintiff in copyright infringement actions of even stepping into the courthouse. A simple comparison of the due process and access to the courts afforded to corporate billion dollar entertainment companies when they appear as plaintiffs in copyright infringement actions further supports the contention that immediate review by this Court is necessary and desperately needed to create uniformity in the Circuits and in copyright cases where the protections and rights pursuant to the U.S. Copyright Act will be granted to all individuals regardless of corporate status.

IV. Conclusion

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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